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Circuit Court Case May Open Door to More ERISA Litigation

An important case involving the question of whether university retirement plans permitted excessive

recordkeeping fees and offered subpar investment options was the subject of another recent development. On remand from the Supreme Court, the U.S. Court of Appeals for the 7th Circuit decided that two claims from the plaintiffs should be reconsidered by the district court. Some experts say this could lead to more litigation regarding ERISA fiduciary decision-making.

Background

In *Hughes v. Northwestern*, the plaintiffs are participants in two of a university's retirement plans. The investment options included in the plans are selected by the plans' fiduciary, but the participants can select their desired investments from within that pool. In 2016, the university streamlined its investment options by reducing the plans' investment offerings. In 2018, plaintiffs, frustrated by the perceived underperformance of the plans' investments, brought a lawsuit alleging that the plan fiduciary breached its fiduciary duty of prudence by (1) incurring excessive recordkeeping fees, (2) failing to swap out certain shares for cheaper but otherwise identical shares, and (3) retaining duplicative funds in the plan that caused participant confusion when making investment decisions. An Illinois district court dismissed the case, finding that the participants could have avoided any problems with the allegedly problematic funds by simply choosing other options. On appeal, the 7th Circuit affirmed the dismissal, noting that the plaintiffs had acknowledged that many of the investment options were prudent, so the plaintiffs could not complain about the flaws in other investment options.

In early 2022, the Supreme Court considered the case. The Court unanimously disagreed with the 7th Circuit's dismissal of the case. According to the Supreme Court's decision, the fact that a plan offers some prudent investment options does not preclude a claim that other options are imprudent. Instead, the question of whether a fiduciary has acted prudently under ERISA is a context-specific inquiry. The Supreme Court remanded the case back to the 7th Circuit for reconsideration.

What are the Implications of the Recent 7th Circuit Decision?

On March 23, 2023, a three-judge panel on the 7th Circuit determined that the first two claims referenced above can proceed because plaintiffs sufficiently alleged that lower-cost recordkeeping options and cheaper shares were options that were plausibly available to the plan. It dismissed the third claim because the plaintiffs did not raise it when the case was remanded from the Supreme Court. This means that the case will now go back to the original Illinois district court for further proceedings.

While this case is far from resolved, the 7th Circuit's decision is still significant. Some legal experts say that this case could open the door for more litigation involving disputes over purported excessive fees charged to retirement plan participants, which would be a worrisome development for plan sponsors and fiduciaries. Some fiduciaries have voiced particular concern that the 7th Circuit allowed the plaintiffs' claims to proceed merely by proposing *plausible* – not actual – alternative options to the fees and shares at issue in the case. In addition, while these decisions from the 7th Circuit are not binding on courts in other Circuit courts, it is possible that other Circuits could follow the 7th Circuit's lead in the future.

Supreme Court Clarifies Access to Abortion Pills While Courts Sort Out Legal Challenges

The U.S. Supreme Court on April 21, 2023 issued an emergency order preventing a Texas district court from enjoining access to mifepristone while a legal challenge to the Food and Drug Administration's ("FDA") 20-year-old approval of the commonly used abortion drug makes its way through the courts. The Supreme Court's emergency order will remain in effect until the substantive case is resolved by the Fifth Circuit Court of Appeals and, if necessary, the Supreme Court.

Supreme Court Weighs in on Texas Court Halting FDA Approval of Mifepristone

On April 7, 2023, a Texas district court judge ordered a nationwide preliminary stay (essentially, a suspension) on the FDA's approval of mifepristone. Mifepristone was first approved by the FDA in 2000 and is commonly used in combination with another drug to induce early-stage abortions. The case - *Alliance for Hippocratic Medicine v. FDA* – was brought by a group alleging that the FDA exceeded its authority in approving mifepristone by not following the proper procedures for drug approvals. (See additional information on the case in Rewards Policy Insider 2023-07.) In his court order, the judge stated that a preliminary stay would be in the public interest in part to stop "unsafe" drugs from entering the market. Notably, there appears to be no precedent for a district court overruling a decision made by the FDA regarding the approval of a medication.

The federal government swiftly appealed the ruling to the U.S. Court of Appeals for the 5th Circuit, which granted the government's request for a partial halt of the Texas judge's ruling. Under the 5th Circuit's order, mifepristone is still available, but only within the first seven weeks of pregnancy and under the supervision of a doctor. In addition, mifepristone is unavailable by mail order. Days later, the federal government – along with a company that distributes mifepristone – sought emergency relief from the Supreme Court. Following an initial temporary hold on the restrictions outlined in the 5th Circuit's order, the Supreme Court issued its emergency order completely blocking the Texas district court's stay.

Conflicting Washington Case Shows Patchy Landscape of Abortion Coverage

Less than an hour after the Texas district court case decision was released, a district court judge in Washington came to essentially the opposite decision. In *State of Washington et al. v. FDA*, the court determined that the FDA is prohibited from "altering the status quo and rights" as they relate to the availability of mifepristone in 17 states plus the District of Columbia. The case was brought by the attorneys general of these 17 states and D.C., who challenged the FDA's

existing restrictions on mifepristone – such as a certification requirement for pharmacies dispensing the medication – as unnecessary.

The judge did not go as far as to grant the plaintiffs' request to order the FDA to expand mifepristone access. However, the judge did order the FDA to not make any changes that would restrict access to the medication in the states that sued.

What Do the Conflicting Cases Mean?

The Supreme Court's emergency order means the status quo with respect to the FDA's approval of mifepristone will prevail for the time being. But that could change if the 5th Circuit and the Supreme Court ultimately uphold the Texas district court's decision. The Washington district court's ruling is not binding on other district courts, but it too could play a part in all of this if it is appealed and the cases are ultimately consolidated.

Ultimately, for group health plans, the question is whether mifepristone will continue to be available. In an environment where abortion-related laws can change daily, health plans should be aware that these legal decisions can create serious compliance and plan design issues, with no easy answers in sight.

Growing Number of States are Developing and Launching Retirement Programs

Recent developments regarding state-facilitated retirement programs that require certain private employers to enroll their employees in such programs include the recent launch of two new programs in Maryland and Colorado and the continuing development of programs in several other states, such as Virginia.

In response to concerns about Americans' retirement preparedness, many state legislatures have enacted laws establishing their own state-facilitated retirement programs. These programs, often called "mandatory auto-IRA programs," generally require employers that do not already maintain a private retirement plan for their employees to enroll their employees in the program. These employees can save through an IRA that is managed by the program but can opt out if they choose. Even in states that have not yet enacted mandatory auto-IRA program legislation, many state legislatures are considering such bills in the 2023 legislative session, meaning that more states could soon join the growing list of states with their own retirement programs. This article provides an overview of recent key updates in the state-run retirement program landscape. (See Rewards Policy Insider 2022-18 for prior updates.)

New Plan Launches

Joining existing programs in California, Connecticut, Illinois, and Oregon, two new states have recently launched mandatory programs. In September 2022, Maryland launched "MarylandSaves," which generally requires all private employers operating in the state that do not already offer a specified retirement

arrangement (such as 401(k)) to enroll their employees in the program. Unlike many of the other existing state programs – which impose penalties on employers that are subject to the state's program mandate but fail to register with the program – MarylandSaves waives a tax filing fee for employers that register.

Most recently, Colorado Secure Savings launched in January 2023. The program generally requires private employers operating in Colorado that have five or more employees and do not already offer a specified retirement plan (such as a 401(k)) to enroll their employees in the program. The program has three "waves" of registration deadlines depending on the size of the employer.

As with all the state programs that are already in operation, these programs do not impose universal mandates on employers in Maryland and Colorado – employers that already maintain a tax-favored retirement plan generally are exempt from participation.

Other Programs Steadily Developing

Six states – Delaware, Hawaii, Maine, New Jersey, New York, and Virginia – have passed mandatory auto-IRA program laws and are in various stages of developing programs like those that are now active in Maryland and Colorado. It is likely that Virginia's program, which generally applies to private employers with at least 25 employees, will be the next to launch. The program has indicated that it aims to launch on or before July 1, 2023.

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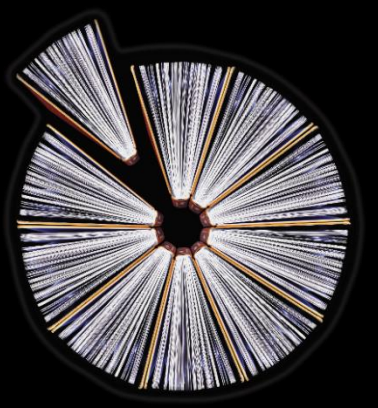

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